SUPREME COURT OF QUEENSLAND

CITATION:	*Ito & Anor v Shinko (Australia) Pty Ltd & Anor* [2004] QSC 268
PARTIES:	**TAKAJI ITO and MIDORI ITO** **(applicants)** **v** **SHINKO (AUSTRALIA) PTY LTD ACN 010 664 196** **(first respondent)** **HOPE ISLAND RESORT DEVELOPMENT CORPORATION LIMITED ACN 086 782 818** **(second respondent)**
FILE NO/S:	BS3786 of 2004
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	30 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2004
JUDGE:	Mullins J
ORDER:	**1. The application against the first respondent is dismissed.** **2. Subject to any proper claim by the second respondent to legal professional privilege in respect of its books and records, the applicants and their solicitor Mr Fusao Nakano and their accountant Mr Richard Kok Chong Wan are authorised to inspect the books and records of the second respondent relating to:** **(a) the allotment of 250 shares to the applicants in or about June 1999 and the financial worth of the second respondent at the time of that allotment; and** **(b) the transfer of the assets of the second respondent, including its business, to Hope Island Resort Holdings Pty Ltd;** **on such terms and conditions as to the time, place and procedure for such inspection as may be agreed between the applicants and the second respondent or, failing agreement, as determined by the Court.** **3. Liberty to each of the applicants and the second respondent to apply on one day's notice in writing to the other.**

CATCHWORDS: CORPORATIONS - MANAGEMENT AND ADMINISTRATION - INSPECTION OF RECORDS - applicants sought order for inspection of records of the respondent pursuant to s 247A *Corporations Act* 2001 (Cth) - where applicants had invested money in respondent in return for security over resort development land - where applicants' concern was in respect of the dissipation by the respondent of the loans - whether applicants were acting in good faith and whether inspection was for a proper purpose - where applicants' purpose in seeking inspection of records did not relate to their position as shareholders of the respondent - application dismissed

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - INSPECTION OF RECORDS - applicants sought order for inspection of records of the respondent pursuant to s 247A *Corporations Act* 2001 (Cth) - where applicants were allotted shares in the respondent in reduction of debt owed to the applicants the liability for which had been assumed by the respondent - where one year later assets of respondent transferred and shares were valueless - where applicants were concerned with the value of the shares at the time they were allotted and when the assets of the respondent were transferred - whether applicants were acting in good faith and whether inspection was for a proper purpose - application granted

Corporations Act 2001 (Cth), s 247A

Re Augold NL [1987] 2 QdR 297
Barrack Mines Ltd v Grants Patch Mining Ltd (1988) 6 ACLC 97
Barrack Mines Ltd v Grants Patch Mining Ltd [1988] 1 QdR 606
Biala Pty Ltd v Mallina Holdings Pty Ltd [1990] WAR 371
Cescastle Pty Ltd v Renak Holdings Ltd (1991) 9 ACLC 1,333
Re Claremont Petroleum NL [1990] 2 QdR 31
Re Claremont Petroleum NL (No 2) (1990) 8 ACLC 548
Czerwinski v Syrena Royal Pty Ltd (2000) 18 ACLC 337
Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd (1989) 7 ACLC 536
Quinlan v Vital Technology Australia Ltd (1987) 5 ACLC 389

COUNSEL: J A Griffin QC and R J Clutterbuck for the applicants
P H Morrison QC for the first and second respondents

SOLICITORS: Nakano Kaneshiro Lawyers for the applicants
Hickey Lawyers for the first and second respondents

[1] **MULLINS J:** Mr Takaji Ito and Mrs Midori Ito ("the applicants") are seeking orders for the inspection and disclosure of documents in the possession of Shinko (Australia) Pty Ltd ("the first respondent") and Hope Island Resort Development Corporation Limited ("the second respondent") pursuant to section 247A(1) of the *Corporations Act* 2001 (Cth) ("the Act"). The applicants hold shares in each of the respondents.

Background

[2] The applicants are Japanese nationals who are neither conversant nor fluent with the written and oral English language. The complaints of the applicants against the respondents are set out in the affidavit of their solicitor Mr Nakano filed on 29 April 2004 ("the Nakano affidavit"). The following is a summary of their complaints taken from the Nakano affidavit.

[3] The applicants claim to have parted with approximately $20m to the first respondent between November 1994 and August 1997. The first respondent owned land that was being developed as the Hope Island Resort. They claim to have paid a sum of $891,000 to the first respondent in return for what they believed was the acquisition of some property, known only as Lots 25, 26, 27 and 28 Rosebank Way, Hope Island Resort .

[4] On 15 November 1994, the applicants claim to have paid a further sum of $1.1m for the purchase of allotments referred to as Neighbourhoods 11 and 12 at Hope Island Resort.

[5] Title searches have not been conducted in respect of the land the subject of these first two transactions, due to the absence of information, as the descriptions either did not have a separate existence or were ill-defined.

[6] On 3 January 1995 the applicants claim to have executed contracts at the first respondent's Gold Coast office for the purchase of two apartments at Hope Island known as "Windsor" and "Ascot" for the sum of $595,000 each. The applicants have been unable to locate any contracts of sale, and claim to have been advised by a representative of the first respondent that the contracts would be retained at the first respondent's office.

[7] On 9 August 1995 the applicants entered into a loan agreement, a copy of which is Ex FN2 to the Nakano affidavit, to record the loan by them to the first respondent of the sum of $5.5m to be secured by the first mortgage over property described as Neighbourhood 6 of Hope Island Resort. A historical title search of the land that corresponds with the description of Neighbourhood 6 (which is Ex FN3 to the Nakano affidavit) shows that the land was the subject of an earlier security in favour of Challenge Bank Limited. No mortgage was ever granted to the applicants.

[8] That loan agreement is described as being representative of some 10 such transactions whereby the applicants lent moneys to the first respondent in exchange for security over property within Hope Island Resort or interests in property that was identified but which property the applicants claim now in some instances did not exist. The applicants claim that the only documents in their possession are loan agreements, diary entries and their own bank statements.

[9] On 8 August 1997 the applicants entered into a revised loan agreement which purported to amalgamate five earlier loan agreements and replace "all previous loan agreements proposed except for advances on Riverleigh Gardens allotments", in return for a security over the Hope Island Golf Clubhouse and Golf Course. Exhibit FN4 to the Nakano affidavit is a copy of that revised loan agreement and a copy of the historical title search of one of the relevant properties that shows that a registered mortgage existed over this land in favour of Challenge Bank Limited at the date of the revised loan agreement. A copy of the historical title search of the other property which also shows that it was subject to a registered mortgage in favour of Challenge Bank Limited at the date of the revised loan agreement is Ex FN1 to Mr Nakano's affidavit filed on 13 May 2004.

[10] Mr Nakano has stated in the Nakano affidavit that the applicants have held their shares in the first respondent since approximately 1998. No information is given by either the applicants or Mr Nakano as to the circumstances in which the applicants became shareholders in the first respondent.

[11] The applicants claim that in 1999 the first respondent transferred to them a portion of land known as Fairway Island within the boundaries of the Hope Island Resort to discharge partially the first respondent's indebtedness to the applicants and the land was treated as being worth $5m and the amount of the debt was reduced accordingly. The applicants claim that the remaining debt which was an amount between $14m and $15m was to be dealt with by the applicants acquiring shares in the second respondent to which all the assets of the first respondent had been transferred. The applicants claim that the arrangement was that they were to acquire a 12.5% shareholding in the second respondent in discharge of the liability owed to them by the first respondent and that they did acquire that shareholding.

[12] The only documents exhibited to the Nakano affidavit relating to the dealings that occurred between the applicants and the first respondent and the second respondent in 1999 are the letter to the applicants from McCullough Robertson dated 6 August 1999 (without enclosures) (Ex FN7) and the report of the administrators of the first respondent dated 31 January 2000 ("the report") (Ex FN8). The title searches in the applicants' material show that transfers of land in the Hope Island Resort to the second respondent were produced for registration on 22 June 1999.

[13] Neither the applicants nor Mr Nakano deal with how or when the applicants came to be in possession of the report. Mr Nakano did state in the Nakano affidavit that his firm took over acting for the applicants from another firm in July 2003 and refers to unsuccessful attempts made to obtain the applicants' files from their former lawyers.

[14] The applicants in their affidavit explained that they invested upwards of $20m in the Hope Island development on the suggestion of other Japanese nationals, Messrs Watanabe and Sekido who introduced them to Mr McBean who the applicants

described as a director of the first respondent and Mr Ian Hazzard of McCullough Robertson who the applicants described as the lawyer for the first respondent. The applicants state that Mr Hazzard was also their solicitor or that they understood that he was throughout their involvement in lending money to the first respondent and their acquisition of shares in the second respondent.

[15] After the application had been filed, Mr Nakano made a further affidavit which was filed on 13 May 2004 in which he stated that Hope Island Resort Holdings Pty Ltd ("HIRH") acquired all remaining assets in the respondents on 30 June 2000 and that he was able to produce a copy of the agreement for sale, if required. This is confirmed by the title searches in the applicants' material which show that transfers of land in the Hope Island Resort from the second respondent to HIRH were produced for registration on 29 January 2001.

[16] Correspondence ensued between the respective solicitors for the applicants and the respondents between 18 and 24 May 2004 in which reference was made by the respondents' solicitors to a meeting that was held of the second respondent's shareholders (including the applicants who were present with an interpreter) at the Hope Island Golf Course on 29 June 2000 at which it was voted unanimously to sell the second respondent's assets and entitlement to HIRH. The applicants' solicitors responded that the interpreter was the applicants' then solicitor from whom they claim they received bad or inappropriate advice and that, if the applicants had approved the transaction, they would not have done so if they had been aware of the true nature of this transaction. There is no affidavit from either the applicants or Mr Nakano which deals with what the applicants can recall about the events in June 2000. The applicants did not dispute on the hearing of this application that a meeting of shareholders of the second respondent at which they were present took place on 29 June 2000.

The respondents' material

[17] Mr Hazzard's affidavit filed by leave on 28 May 2004 deals with his relationship with the respondents and the applicants respectively, the meeting and transactions of 15 June 1999 and the meetings on 28 and 29 June 2000. According to Mr Hazzard, on 15 June 1999 the applicants had a meeting with him in which a proposal was put forward on behalf of the first respondent which was translated into Japanese by an interpreter employed by McCullough Robertson. The proposal, which is Ex IWH1 to Mr Hazzard's affidavit (in both English and Japanese), refers to the first respondent being in a state of "extreme financial difficulties" with receivership imminent and the creation of "a new entity Hope Island Resort Development Corporation Limited" (i.e. the second respondent). Under the proposal the first respondent would transfer ownership of Fairway Island to the applicants, thereby reducing the debt owed by the first respondent to the applicants from $19,422,026 to $14,422,026, with the applicants having the option to commit Fairway Island to be developed by the second respondent. (It is common ground that the applicants subsequently sold Fairway Island for $12.6 million.) Under the proposal the remainder of the debt owed by the first respondent would be discharged by the applicants acquiring a 12.5% shareholding in the second respondent. The proposal also provided that the second respondent would pay for all the outgoings in respect of Fairway Island as an advance against the future dividend entitlements in the second respondent and $20,000 per month as an advance against future dividend entitlements in the second respondent.

[18] According to Mr Hazzard, the documents giving effect to such a proposal, namely put and call option between the second respondent and the applicants, notice of exercise of the option by the applicants to the second respondent requiring the second respondent to allot shares to the applicants and undertaking by the second respondent to the applicants, were then executed on the same day. Copies of these documents are Ex IWH2 to Mr Hazzard's affidavit. The put and call option deed recited that the second respondent had agreed to assume the debt of $14,422,026 owed by the first respondent to the applicants and provided that the consideration provided by the applicants for the allotment of the shares consequent upon the exercise of the call option was the acceptance by the applicants of a reduction of the debt by $14,422,026. By the letter dated 6 August 1999 (including a copy of the letter in Japanese) which is Ex FN7 to the Nakano affidavit, McCullough Robertson forwarded copies of these documents to the applicants and summarised the effect of the transactions. The letter also referred to the 250 shares in the second respondent being allotted to the applicants at a premium of $57,688.10 per share.

[19] Mr Hazzard claimed that while McCullough Robertson had in the past been engaged by the applicants in relation to other matters, such as preparation of wills and some minor conveyancing and he had conduct of some of those files, neither he nor the firm ever acted for the applicants either in respect of any loans to the first respondent or their acquisition of shares in the second respondent. He claimed that at the meeting on 15 June 1999 he explained to the applicants with the assistance of the interpreter that they were entitled to take independent legal advice, if they wished, as he was acting for the first respondent and not them.

[20] Mr Hazzard stated that on 28 June 2000 the applicants attended a meeting at the office of McCullough Robertson with their then solicitor and discussed various proposals concerning the applicants' investment in the second respondent. Mr Hazzard stated that on 29 June 2000 at a meeting of the second respondent's shareholders at the Hope Island Golf Course, the applicants (having received advice from their solicitor) voted with the other shareholders in favour of several proposals including a transfer of the assets of the second respondent. The minutes of the shareholders' meeting are Ex IWH3 to Mr Hazzard's affidavit.

[21] According to the company search of the second respondent, of the 4,000 ordinary shares issued in the second respondent, the applicants held 500, Mactac Pty Ltd held 400, D K Land Group Pty Ltd held 2,000 and Fish Developments Pty Ltd held 1,100. The minutes of the shareholders' meeting held on 29 June 2000 show that Mr Fish was present as proxy for Fish Developments Pty Ltd, Mr McBean as proxy for Mactac Pty Ltd and Mr Kilmartin as proxy for D K Land Group Pty Ltd and that the applicants were also present. The minutes recite that it was agreed that Mr Fish would chair the meeting and he tabled documents which would give effect to a transfer of all of the assets of the second respondent and noted that the directors had resolved that it was in the best interests of the company to sign the documents. According to the company search of the second respondent, the directors at that time were Mr Fish, Mr McIvor and Mr McBean. The resolutions that were passed at that meeting were:

> "1. RESOLVED that it is in the best interests of the Company to agree to the terms of the documents giving effect to a transfer of all of the assets of the Company, including the business of the Company, which documents were tabled by the Chairman at the commencement of this meeting.

2. Resolution No. 1 above shall not take effect until D.K. Land Group Pty gives the Company a written direction that John Mervyn Thomas Fish and Terence John McBean as directors of the Company be authorised to sign the documents on behalf of the Company."

[22] Mr Hazzard described in his affidavit a number of aspects of the proposal which he stated was approved by the applicants at the meeting of the shareholders of the second respondent held on 29 June 2000. One of the aspects of that proposal was that the applicants would receive a land component of $5m plus 12.5% profit share from the development of Fairway Island through the second respondent or another company. Mr Hazzard did not deal in any way with how that proposal worked with the proposal which the applicants entered into as a result of the transactions on 15 June 1999. The resolutions passed at the meeting on 29 June 2000, as set out in the preceding paragraph, do not reflect the detail of the proposal described in Mr Hazzard's affidavit. Submissions were made by the respondents on the hearing of the application on the basis that the proposal of the 12.5% profit share from the development of Fairway Island was implemented. I am not satisfied that the material discloses that was the case, particularly as it was common ground that the sale of Fairway Island for $12.6m was by the applicants.

[23] It is clear that there is a dispute between the applicants and Mr Hazzard as to what role he had to play in respect of the transactions involving the applicants. This application must proceed on the basis that such dispute exists.

[24] Mr McBean swore an affidavit that was relied on by the respondents in connection with the application. Mr McBean has been a director of the first respondent since 16 March 2000, although the company search of the first respondent shows that Mr McBean was the secretary of the first respondent between 15 January 1991 and 16 July 1999. Mr McBean stated in his affidavit that most of the dealings which the applicants had with the first respondent were done on their behalf by Mr Watanabe with Mr Sekido acting on behalf of the first respondent.

Administrators' report

[25] Mr Hennessy and Ms Dare were appointed provisional liquidators of the first respondent on 10 August 1999, as a result of a breakdown in negotiations between the shareholders of the first respondent regarding control of the company. There had been a change in the control of the first respondent from 19 January 1998 when the 1 B class share carrying 51% of the voting rights had been issued to Hope Island Resort Management Pty Ltd, a company of which Mr McBean and Mr Sekido were the directors and shareholders. Previously the first respondent had been under the control of a Japanese company I Red Co and Mr Shigeru Isutani. According to the report, the first respondent had traded at a loss between 1991 and April 1999, except for 1998 and was in financial difficulties in 1999. The report refers to the sale of assets from the first respondent to the second respondent. That appears to have been associated with joint venture agreements entered into between the first respondent and a developer Jefferson Properties Pty Ltd ("Jefferson") for the development of parts of the Hope Island Resort. According to the report, the shareholding of the second respondent was 50% held by Jefferson and 12.5% held by each of Mactac Pty Ltd (the company associated with Mr McBean), the

applicants, Spike Pty Ltd (a company associated with accountant Mr James Whitelaw whose firm was the first respondent's accountant) and Mr Isutani (although the report notes that Mr Isutani disputed the shareholding held by him). The report notes that the first respondent sold the majority of its remaining assets including the golf course, harbour lot, and the land described as Neighbourhoods 2 and 7 to the second respondent in consideration of certain liabilities by the second respondent of the first respondent and the payment of a cash balance.

[26] The provisional liquidators investigated the transfer of assets from the first respondent to the second respondent. The report confirms that one aspect of this transfer of assets and assumption of liabilities by the second respondent concerned the debt owed by the first respondent to the applicants. According to the provisional liquidators, however, the debt owed to the applicants had never appeared in the books of the first respondent. The following is taken from paragraph 7.2.2 of the report:

> "It would appear that funds advanced from Mr and Mrs Ito were not necessarily advanced to Shinko, but in some instances, were advanced directly to I Red Co in Japan. Nonetheless, in respect of each of the transactions, it appears that Shinko borrowed the money, whether for its own use or for the use by related entities in Japan, and granted unregistered security to Mr and Mrs Ito over real estate at Hope Island Resort in respect of the advances.
>
> In some instances, the loan amounts are denominated in Japanese yen, whereas in other instances the loan amounts are denominated in Australian dollars. Where amounts were paid direct to I Red Co, the company's books and records indicate that the payment was applied in reduction of Shinko's debt to I Red Co. It appears that the monies have been borrowed by Shinko and are a debt of Shinko."

[27] The provisional liquidators expressed in the report an opinion that the agreement for sale between the first respondent and the second respondent which they say was executed by Mr McBean on behalf of the first respondent pursuant to a power of attorney may be vulnerable to being set aside, but there were commercial considerations against taking that course.

[28] The second respondent had proposed to the provisional liquidators that it would underwrite a fund for the purpose of paying the unsecured creditors to a specified amount pursuant to a deed of company arrangement. The provisional liquidators therefore obtained the leave of the court on 19 November 1999 to appoint themselves administrators of the first respondent and did so on 14 January 2000. The report was prepared for the purpose of a creditors' meeting on 9 February 2000 at which the deed of company arrangement was to be put to the vote. According to the company search of the first respondent, Mr Hennessy and Ms Dare ceased to be administrators of the first respondent on 9 February 2000 and on that date became administrators under a deed of company arrangement which was finalised on 8 November 2000. It is clear that because of the transactions that had been effected in June 1999 involving the applicants and the first and second respondents, the applicants were not creditors of the first respondent for the purpose of considering the deed of company arrangement.

Applicants' request for inspection

[29] On 2 and 8 October 2003, by letter and facsimile to the first respondent, the applicants' solicitor enquired as to whether the first respondent had ever issued dividends to its shareholders and sought to inspect the company books to verify whether the applicants had missed out on any dividend payments in the past. The applicant's solicitor forwarded a letter in similar terms to the second respondent on 15 October 2003. Minter Ellison Lawyers, who were the solicitors for the first respondent at the time, responded by facsimile on 9 October 2003 that shareholders are not entitled to inspect company books and that the first respondent had never issued dividends and had no current prospects of doing so. No response was received to the request for inspection directed to the second respondent.

Applicants' expressed purpose for inspection

[30] The applicants state that they want to inspect the documents to find out where their moneys went and whether there has been fraudulent or improper conduct practised upon them at the time they lent moneys to the first respondent and at the time they acquired shares in the second respondent. The purposes for inspecting the documents are expanded upon in the Nakano affidavit. In relation to the loans, it is stated that the applicants are seeking to inspect all contracts and books of account that may show where the moneys went that were paid by the applicants, what property was truly available for acquisition by the applicants as security and whether the funds that were lent to the first respondent ended up in the company account of the first respondent. The applicants also wish to investigate whether any of the directors of the respondents or other persons providing advice to those directors or officers of the respondents were involved in the dissipation of the applicants' moneys for purposes other than investment by the applicants in the Hope Island Resort. It is also claimed in the Nakano affidavit that it was represented to the applicants that the assets of the second respondent were sufficient to enable them to acquire value for each share that was purchased, so that the indebtedness of the respondents to them would be satisfied by their purchase of shares in the second respondent. It was also obliquely raised in the applicants' material that they were seeking to ascertain why their shares in the second respondent were worthless. During the hearing of the application, Mr Griffin QC who led Mr Clutterbuck of Counsel for the applicants raised that the applicants had a legitimate interest in finding out why their shares in the second respondent became worthless.

Legislation

[31] Section 247A(1) of the Act provides:

> "On application by a member of a company or registered managed investment scheme, the Court may make an order:
>
> (a) authorising the applicant to inspect books of the company or scheme; or
>
> (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
>
> The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose."

[32] If the court makes an order under s 247A, the court is empowered under s 247B of the Act to make any other orders it considers appropriate, including either or both of the following orders:

> "(a) an order limiting the use that a person who inspects books may make of information obtained during the inspection;
>
> (b) an order limiting the right of a person who inspects books to make copies in accordance with subsection 247A(2)."

Under s 247A(2) of the Act, a person authorised to inspect books may make copies of the books, unless the Court otherwise orders.

[33] A person who inspects books on behalf of an applicant under s 247A of the Act is restricted under s 247C of the Act from disclosing information obtained during the inspection, unless the disclosure is to ASIC or the applicant.

Authorities

[34] The onus is on the applicant to establish that the applicant is acting in good faith and that the inspection is to be made for a proper purpose, although if the application is made by a substantial shareholder of long standing those facts in themselves may be sufficient to discharge the onus: *Quinlan v Vital Technology Australia Ltd* (1987) 5 ACLC 389, 393.

[35] The applicant for an order pursuant to the provision that was a forerunner of s 247A of the Act was unsuccessful in *Re Augold NL* [1987] 2 QdR 297. It was found that the applicant's motivation in bringing the application was a desire to improve its prospects of making a successful takeover bid for the company and that was an improper purpose. Williams J (as his Honour then was) did not consider that the statutory right to inspect documents with the leave of the court altered the basic role of company law that a shareholder ought not ordinarily be able to challenge in the courts a managerial decision made by the directors. Williams J at 309 referred to the discretion that was conferred being a broad one, fettered only by the requirements that the member be "acting in good faith" and that the "inspection is to be made for a proper purpose" and stated:

> "But it seems to me that the statute is so worded because the legislature was directing the Court to look not only at the purpose of the inspection in an objective sense, but also at the applicant's state of mind, a subjective consideration."

[36] That approach was followed by Ryan J in *Barrack Mines Ltd v Grants Patch Mining Ltd* (1988) 6 ACLC 97. In that case it was found that the applicant was seeking the inspection for more than one purpose. Its primary purpose was to protect its substantial financial interest as a major shareholder in the relevant company. The fact that it was also found that the applicant had another purpose which was to obtain information to be used in support of its takeover bid did not preclude the order for inspection being made. The decision was affirmed on appeal: *Barrack Mines Ltd v Grants Patch Mining Ltd* [1988] 1 QdR 606. In respect of the argument that any ulterior motive by an applicant, whether associated with the primary purpose or not, must defeat the application for inspection, Andrews CJ (with whom the other members of the court agreed) stated at 615:

> "Provided that the judge who was called upon to exercise his discretion in such a matter finds on evidence before him that the

> application is based upon a proper purpose, for example, to protect a right or interest which is personal to the applicant he may then regard the application as being made in good faith."

[37] In *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 7 ACLC 536 the applicant was seriously concerned about its investment in the subject pastoral company, on the basis that there had been an overstatement in the prospectus when the company was floated as to the size of the herd that was transferred to the company. The applicant therefore wanted to inspect the books to be in a better position to decide whether to accept a takeover offer or to retain its shares and seek removal of the existing directors and to decide whether to bring or procure the bringing of legal proceedings against the vendors or promoters or directors of the company. On the evidence, there was a "case for investigation" about the overstatement of the size of the herd. Brooking J was of the view that the requirements "acting in good faith" and "for a proper purpose" expressed a composite notion rather than two distinct requirements and stated at 541:

> "On the approach which I am inclined to favour, the reference to good faith colours and so reinforces the requirement of proper purpose. Acting in good faith and inspecting for a proper purpose means acting and inspecting for a bona fide proper purpose."

Brooking J considered that for a purpose to be a proper purpose it must be "reasonably related to the status of a member, or it is something which the plaintiff wishes to do for purposes reasonably related to that status" (at 541).

[38] It was argued in *Re Claremont Petroleum NL* [1990] 2 QdR 31 that the construction of the provision which was the forerunner of s 247A of the Act should be approached on the basis that it did no more than state or clarify the principles of common law on when a member of a company was entitled to inspect the books of the company. That was rejected by Connolly J (with whom the other members of the court agreed) on the basis that the broad and general language of the provision gave an unfettered discretion to the court, provided the conditions of good faith and proper purpose were satisfied.

[39] The concern of the shareholders in *Biala Pty Ltd v Mallina Holdings Pty Ltd* [1990] WAR 371 was that the company had been associated with a petrochemical project from which it had withdrawn and one of the directors of the company had become involved in another company which was successful in obtaining a government contract to undertake a feasibility study for construction of a petrochemical complex. The shareholders held between them approximately 27% of the shares of the subject company and were dissatisfied with the response of one of the directors of the company to their queries about why the company was not involved in the petrochemical project. The response was described as providing "… conflicting and sparse answers, which tend to raise more, and increasing, suspicions that the directors may have acted in breach of their duties". The application was allowed as the evidence disclosed there was a case for investigation as to what happened to the subject company's interest in the project for the purpose of seeing whether the directors had acted properly.

[40] Young J (as his Honour then was) in *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 9 ACLC 1,333 considered that the effect of the authorities was that the words "proper purpose" had been construed as meaning a purpose connected with the

proper exercise of the rights of a shareholder as a shareholder, as opposed to the purpose connected with some other interest, such as an interest as a bidder under a takeover scheme, or as a litigant in proceedings against the company (at 1,335).

[41] It was common ground between the parties on the hearing of the application that any order for inspection should not defeat a claim for legal professional privilege. That is consistent with the approach taken in *Czerwinski v Syrena Royal Pty Ltd* (2000) 18 ACLC 335 where the application for inspection pursuant to s 247A of the Act was refused on the basis that it had been made as a tactical manoeuvre to overcome the claim for legal professional privilege made in other proceedings involving the same interests.

[42] The applicants sought an order for inspection of the records of each respondent which was not in any way curtailed by identification of specific records. The respondents relied on the orders which had been made in a number of authorities restricting inspection to the documents which were necessary to enable the purpose of the inspection to be fulfilled. Examples of such orders are found in *Re Claremont Petroleum NL* [1990] 2 Qd 31, 31-32; *Re Claremont Petroleum NL (No 2)* (1990) 8 ACLC 548, 552-553. Generally, as the inspection must be for a proper purpose, that itself will act as a limitation on the ambit of the books and records which can be inspected pursuant to an order made under s 247A of the Act.

Whether there should be inspection of the first respondent's records

[43] With respect to the first respondent, the concerns of the applicants can be summarised as:

a. the dissipation of the moneys lent by the applicants to the first respondent;
b. whether there was any actionable conduct by the first respondent, its officers or other persons associated with the first respondent or Mr Hazzard that induced the applicants to lend moneys to the first respondent;
c. whether there was any actionable conduct on the part of the first respondent, its officers or other persons associated with the first respondent or Mr Hazzard that resulted in the applicants entering into the transactions on 15 June 1999.

[44] There is nothing in the material which deals with the relationship between the applicants' shareholding in the first respondent to these concerns. The applicants hold 625,000 ordinary shares of the 5,000,002 ordinary shares issued in the first respondent. There is also 1 B class share issued in the first respondent which is still held by Hope Island Resort Management Pty Ltd. There is nothing in the material to link the loans made by the applicants with their shareholding in the first respondent. In any case, the applicants are not concerned about how their interest as shareholders in the first respondent was affected by the transfer of the assets of the first respondent to the second respondent in June 1999, but about the value of the shareholding they obtained in the second respondent in exchange for the reduction of the debt owed to them by the first respondent which had been assumed by the second respondent.

[45] The purpose for which the applicants are seeking inspection of the books and records of the first respondent therefore has nothing to do with the interests of the

applicants as shareholders of the first respondent. Their purpose for seeking the inspection therefore cannot be a proper purpose within the meaning of s 247A of the Act. The applicants cannot succeed in their application against the first respondent.

Whether there should be inspection of the second respondent's books and records

[46] According to the transactions involving the applicants in June 1999, the value of the 250 shares in the second respondent at the time that they were allotted to the applicants was in the vicinity of $14.4m. A critical concern of the applicants is whether the net assets of the second respondent, as at 15 June 1999, justified the acceptance by the applicants of 250 shares in the second respondent in satisfaction of the debt that had been owed to them by the first respondent of $14.4m and was assumed by the second respondent.

[47] There is no explanation in the material as to how the shareholding of the applicants in the second respondent increased to 500 shares, although by holding 500 shares the applicants have maintained their interest in the second respondent at 12.5% which accorded with the proposal put to them in June 1999. It appears that Jefferson ceased to be a 50% shareholder of the second respondent between June 1999 and June 2000. It was common ground on the hearing of the application that the second respondent is now a shell and that all its assets have gone.

[48] It appears that the transfer of the assets of the second respondent to HIRH, as a result of the resolution passed at the shareholders' meeting on 29 June 2000, is the cause of the second respondent now being a company with no assets, making the shares of the applicants valueless.

[49] It is also in the interests of the applicants as shareholders of the second respondent to ascertain whether they had any cause of action against the second respondent, its directors or any other person associated with the second respondent, as a result of their shares being valueless.

[50] The second respondent seeks to rely on the participation of the applicants in the relevant shareholders' meeting and that the applicants were advised by their then solicitor. These are the very aspects of what occurred in June 2000 that were put in issue by the applicants' solicitors in correspondence with the second respondents' solicitors. It is critical to the position that the applicants find themselves in as shareholders in the second respondent that the second respondent transferred its assets to HIRH. The applicants are minority shareholders in the second respondent. They have a real interest in pursuing the second respondent, its directors or any other person associated with the second respondent in respect of that transaction, if they can establish that there was fraud or misrepresentation on the part of the second respondent, its directors or any other person associated with the second respondent involved in obtaining their vote in favour of the resolutions.

[51] There is no doubt that the applicants have more than one purpose in seeking the inspection of the books and records of the second respondent. They are also seeking to pursue claims against Mr Hazzard and, possibly, the solicitor who acted for them in June 2000. This is the type of case where the shareholder has more than one purpose in seeking inspection, but where a substantial purpose of the application is a proper purpose within the meaning of s 247A of the Act.

[52] It is submitted by Mr Morrison QC on behalf of the second respondent that the applicants have not acted in good faith, because they did not expressly disclose in their material any detail about the June 2000 transaction and their first request of the second defendant for inspection was in relation to a query about dividends. There is no bad faith on the applicants' part in making a request for inspection allied to a query about dividends, because that query is a reflection of the applicants' complaint in respect of their investment in the second respondent being worthless.

[53] I have greater concern about the failure of the applicants to disclose what they did know of the events in June 2000. To the extent that the information is disclosed in the material that was before the Court on the hearing of the application about the events in June 2000, that material raises more questions, than provide any explanations or resolutions. It appears that the conversion of debt to shares in the second respondent has been the event that the applicants have focussed upon in their enquiries to date. The respondents' material to the extent that it touches upon the events in June 2000 does not reflect adversely on the applicants, when account is taken of the fact that the applicants dispute the appropriateness of the advice that they obtained from the solicitor who advised them on 28 and 29 June 2000. I do not consider that, in the context of what the applicants perceived was their concern at the time the application was filed, that their failure to disclose the events of June 2000 amounts to lack of good faith on their part.

[54] Whether or not the requirements of good faith and proper purpose amount to two conditions or a composite condition that must be satisfied before an order is made under s 247A, I am satisfied that the applicants, as shareholders in the second respondent, are acting in good faith and seeking inspection for a proper purpose of the second respondent's records to investigate their concerns about the value of the second respondent's shares at the time of the allotment of 250 shares to the applicants and at the time that the second respondent then resolved to transfer its assets to HIRH.

Orders

[55] In view of the reasons that I have expressed for making an order in favour of the applicants for inspection of certain books and records of the second respondent, the parties may wish to consider whether they can agree on the terms and conditions on which the inspection should take place. The concerns expressed by Mr McBean about inspection of the second respondent's documents, if there were no limitation on the documents that could be inspected, is met by specifying the events to which the documents must relate. I am not satisfied that it is appropriate to require the applicants to pay the second respondent's costs in connection with the inspection. Pending resolution of the procedural aspects of carrying out the inspection, I propose to make the following orders:

1. The application against the first respondent is dismissed.
2. Subject to any proper claim by the second respondent to legal professional privilege in respect of its books and records, the applicants and their solicitor Mr Fusao Nakano and their accountant Mr Richard Kok Chong Wan are authorised to inspect the books and records of the second respondent relating to:

   (a) the allotment of 250 shares to the applicants and the financial worth of the second respondent at the time of that allotment; and

(b) the transfer of the assets of the second respondent, including its business, to Hope Island Resort Holdings Pty Ltd,

on such terms and conditions as to the time, place and procedure for such inspection as may be agreed between the applicants and the second respondent or, failing agreement, as determined by the Court.

3. Liberty to each of the applicants and the second respondent to apply on one day's notice in writing to the other.

[56] I will give the parties an opportunity to make submissions on the costs of the application, after these reasons have been published.